# Re: Florida HCP

1 message

**Frazer, Gary** <gary_frazer@fws.gov> Wed, Feb 1, 2017 at 3:59 PM
To: "Albrecht, Virginia" <valbrecht@hunton.com>

Happy to help. -- GDF

*Gary Frazer*
*Assistant Director -- Ecological Services*
*U.S. Fish and Wildlife Service*
*(202) 208-4646*

On Wed, Feb 1, 2017 at 3:50 PM, Albrecht, Virginia <valbrecht@hunton.com> wrote:

> Gary -- Just wanted you to know legal counsel did participate in the meeting by phone. We still have a ways to go but progress was made. Thanks for your good assistance. Virginia
>
> Sent from my iPhone
>
> On Jan 24, 2017, at 8:03 AM, Frazer, Gary <gary_frazer@fws.gov<mailto:gary_frazer@fws.gov>> wrote:
>
> Just spoke with the Regional Director, Cindy Dohner. She suspects there's been some miscommunication, but she's going to dig into it, and I'm confident they will have legal counsel there as a result. -- GDF
>
> Gary Frazer
> Assistant Director -- Ecological Services
> U.S. Fish and Wildlife Service
> (202) 208-4646
>
> On Mon, Jan 23, 2017 at 4:30 PM, Albrecht, Virginia <valbrecht@hunton.com<mailto:valbrecht@hunton.com>> wrote:
> Gary – I left a voicemail on what I thought was your phone, but just in case here's an email message too. Please give me a call when you can – 202-955-1943. We have a meeting next week in your regional office in Atlanta, and I've got a question that relates to the meeting. The meeting is about the multi-species HCP that is being proposed by landowners and NGOs in southwest Florida. Thanks, Virginia
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# Eastern Collier HCP -- white paper

1 message

**Albrecht, Virginia** <valbrecht@hunton.com> Thu, Apr 27, 2017 at 2:10 PM
To: "Frazer, Gary" <gary_frazer@fws.gov>

Gary – Here's the white paper we sent to the Service in February. As discussed, we had very productive meetings in Collier County yesterday and Tuesday with Rob Tawes and David Dell (from the regional office) and Ken MacDonald and Connie Casseler (sp?) ( from Vero Beach) and have made good progress on completing the HCP and the draft EIS (and related environmental reviews). All agree that in order to move forward we need the Solictor's office to engage on the issue of how to address vehicle strikes of panthers, and we appreciate your help in securing that important involvement. I think there was general sentiment that the decision how to address vehicle strikes could have national implications, so coordination with headquarters would likely be useful at some point.

Let me know if you need anything further. I will be out of the office today and tomorrow so best way to call me is via cell phone – 240-498-6409.

Thanks, Virginia


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**ECPO Legal Summary of Proper Scope of Environmental Analysis for Roadway....pdf**
173K

**The Proper Scope of Environmental Analysis for Roadway Impacts**

**February 9, 2017**



## I. Introduction

The Eastern Collier Property Owners (ECPO) submit the following response to a request from the U.S. Fish & Wildlife Service (FWS or the Service) to provide ECPO's position on the proper scope of analysis for the environmental reviews of ECPO's incidental take permit (ITP) application, including whether and how to consider third party vehicle collisions with Florida panthers. As explained in detail below, while the impacts of third party vehicle collisions may not be attributed to the ITP or to ECPO, roadway impacts on the panther may properly be considered in the baseline and cumulative effects sections of the environmental reviews.

ECPO is a group of private landowning companies. ECPO members intend to build residential and commercial developments and conduct earth mining activities on various

properties they own in Collier County, Florida. These activities may impact endangered and threatened species in the area, including the Florida panther. Construction and mining activities generally proceed in a slow and methodical manner that does not pose a lethal threat to the panther or most other species. However, the light, sound, and/or vibration from construction or mining activities may disturb or annoy species. It is possible that species could be disturbed to such an extent that normal behavioral patterns, such as feeding, sheltering, and breeding, are disrupted. Under the Endangered Species Act (ESA or Act), such impacts may qualify as "take" in the form of "harassment," and are prohibited with certain exceptions (such as where the take is authorized by an incidental take permit). To obtain authorization for such incidental take, ECPO applied for an ITP from the Service, and prepared the requisite Habitat Conservation Plan (HCP).

The HCP is designed to provide large, interconnected, landscape scale preservation of habitat – over 100,000 acres of private land that would otherwise be subject to residential, commercial, or industrial development – to benefit the panther and other protected species. The HCP is the result of a collaborative effort by the landowner applicants and four leading conservation organizations, including Audubon of Florida, Audubon of the Western Everglades, Defenders of Wildlife, and Florida Wildlife Federation, and is designed to ensure an environmentally sensitive balance between conservation of habitat and reasonable economic uses of private land.

The HCP, in accordance with county conservation programs,[1] focuses on the preservation of approximately 107,000 acres of high-value (privately owned) habitat within Collier County to

[1] The HCP is consistent with the Collier County Rural Land Stewardship Area (RLSA) program. The applicants and other land owners worked with local conservation organizations, Collier County, and state agencies to create the Collier County RLSA program in 1999. The program, approved by Collier County and the State of Florida in 2002, offers an alternative to low-density zoning, creating incentives for property owners to permanently protect environmentally sensitive lands in exchange for "stewardship credits" that allow for compact development at higher densities within areas that have limited natural resource values.

offset the impacts of harassment associated with the development of 45,000 acres of lesser-value (privately owned) land. If issued, the ITP would authorize *take,* in the form of harassment, *incidental to* the covered activities. Critically, the ITP *would not* authorize the activities themselves, nor could it.[2]

Indeed, the Service's Revised HCP Handbook emphasizes:

> A basic tenet underlying [ITP] applications is that the Services are not authorizing the applicant's activities that are causing the take. Instead, the Services are authorizing the incidental take that results from the applicant's covered activities.

Revised Handbook at 4-14 (Dec. 21, 2016). This point is important because, as the Revised Handbook recognizes, the public is often confused about the scope of FWS's review.[3] Thus, FWS "must clearly and consistently distinguish between [the] proposed action (i.e., issuance of an [ITP] for the purpose of authorizing incidental take for covered activities within the context of an HCP) and the specific activities of the applicant." *Id.*

Some public comments[4] have indicated confusion about the nature of an ITP, including whether FWS is authorizing ECPO's members' development and mining activities. That confusion has, in turn, led to suggestions by some commenters that the ITP will cause or control changes in nearby traffic patterns and the potential for an increase in vehicle strikes of the

[2] *See* Draft Environmental Impact Statement; Eastern Collier Multi-Species Habitat Conservation Plan; Collier County, Florida, 81 Fed. Reg. 16,200, 16,201/2 (Mar. 25, 2016) ("The prospective applicants intend to seek an [ITP] that would authorize take resulting from the residential and commercial development and earth mining activities . . ."); *see also* Eastern Collier Multi-Species Habitat Conservation Plan, Environmental Impact Statement, Draft Scoping Report at 1 (June 2016) ("Draft Scoping Report"). The requested ITP would authorize take in the form of harassment.

[3] "[S]takeholders often do not understand this concept, at least initially, so we find ourselves spending weeks or months responding to issues and concerns that are associated with an applicant's project . . . which the Services have no control over via our ESA authority." Revised Handbook at 4-14.

[4] FWS issued its Draft Scoping Report in June 2016 identifying relevant issues that will influence the scope of the environmental analysis. Vehicle strikes were raised in public scoping comments. For example, the Conservancy of Southwest Florida commented that FWS was ignoring the full impact of the ITP by not including take coverage for panthers killed by vehicle strikes. Draft Scoping Report at 19.

endangered Florida panther, and that FWS should require ECPO to mitigate for these potential traffic-related impacts.

FWS is not authorizing the development or mining activities to be covered by the ITP. Rather, it is authorizing take (in the form of harassment) incidental to those activities. Indeed, the covered activities will be authorized by various local, county, state and federal permits, and could (as with most development in the region) proceed without the ITP. Moreover, even beyond the limited nature of FWS's proposed ITP, as a general matter private land developers do not control and are not responsible for the actions of the residents who live in their communities or the individuals who frequent their commercial establishments, much less the driving behavior of those or other individuals on internal or external roadways.[5] Vehicle strikes of panthers are generally the result of a confluence of different factors, including speed limit, road design (including whether or not there are wildlife barriers or crossings), driver behavior and skill, and panther behavior. FWS's issuance of the ITP will not authorize or control the activity that directly causes vehicular takes – automobile operations. Moreover, the governing speed limit and the design of roadways, as well as driver behavior, are outside the scope of FWS authority and control. This does not mean that FWS should not consider potential vehicle strikes as part of

[5] Under applicable legal principles, a person may be held liable for *direct* take if he actually undertakes the activity that results in take, or for *indirect* take if he controls the manner in which the taking activity is conducted. *Strahan v. Linnon*, 187 F.3d 623 (1st Cir. 1998) (unpublished op.). The Supreme Court has recognized the limiting principle that the ESA take prohibition is subject to "ordinary requirements of proximate causation." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 700 n.13 (1995). Thus, it is not enough to show that take is "possible" or "likely," *Arizona Cattle Growers v. FWS*, 273 F.3d 1229, 1243-46 (9th Cir. 2001), or to show a "numerical probability of harm." *Am. Bald Eagle v. Bhatti*, 9 F.3d 163, 165-66 (1st Cir. 1993). The Service must show that the regulated activity will actually cause take. *Arizona Cattle Growers*, 273 F.3d at 1246. In the case of panther takes resulting from vehicle strikes, this would mean that a person could be liable if he actually operates the vehicle that strikes a panther or, through legal authority, requires that vehicle be operated in a specific manner that will result in strikes of panthers. Certainly, one who develops a residential community does not, by virtue of that construction, cause vehicular take of panthers or control the manner in which vehicles are operated by residents. Accordingly, the relevant focus of the applicable environmental review is the effect of the ITP and not the effect of ECPO's activities.

its environmental reviews; rather, it reinforces the importance of FWS recognizing that neither its ITP nor the applicant's covered activities are the *cause* of vehicle strikes.

The Service must focus its environmental reviews on those discrete effects caused by *its* proposed action – the authorization of incidental take – and tailor the environmental analysis accordingly. Applying the proper scope of environmental analysis is critical to ensuring an efficient and effective review process, and thereby developing a focused and well-supported ITP. An overly narrow scope would fail to consider all effects of the action. An overbroad scope, however, would attribute events (such as vehicle strikes of panthers) to the Service's issuance of the ITP despite the fact that those events that are not caused by the ITP, exaggerate the effects attributed to the ITP, preclude the ability to meaningfully shape the ITP to offset attributed effects, and leave the analysis without a solid limiting principle to guide the Service's action. This means that vehicle strikes of panthers may not be treated as "direct" or "indirect" effects of the ITP. However, roadway impacts including vehicle strikes may properly be considered in the baseline and cumulative effects sections of the environmental reviews.

## II. The Scope of the Environmental Analysis Must Be Tailored to those Effects Actually Caused by the Proposed Federal Action – the Issuance of the ITP.

### A. Legal Background

Section 9 of the ESA prohibits the "take" of endangered species within the United States or its territorial sea, except in accordance with other parts of the statute. 16 U.S.C. § 1538(a)(1)(B). The take prohibition may also be extended to threatened species by rule. The ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). "Harass" is defined as an activity "which creates the likelihood of injury to wildlife by annoying it to such an extent as to

significantly disrupt normal behavioral patterns," such as "breeding, feeding, or sheltering." 50 C.F.R. § 17.3.

FWS may authorize take in certain circumstances. For example, pursuant to ESA Section 10, take that is incidental to a non-federal activity may be authorized through an ITP, provided certain conditions are met. 16 U.S.C. § 1539(a)(1)(B). FWS defines "incidental take" for ESA purposes as "takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant." 50 C.F.R. § 402.02.

Applicants for ITPs must include with their application an HCP describing, *inter alia*, the likely impacts of the take and the measures the applicant will implement to minimize and mitigate such impacts. 16 U.S.C. § 1539(a)(2)(A). FWS "shall issue" an ITP if it finds that "[t]he taking will be incidental" to an otherwise lawful activity, "[t]he applicant will, to the maximum extent practicable, minimize and mitigate the impacts of *such takings*," "[t]he taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild," and provided that other requirements, such as ensuring adequate funding for the HCP, are met. 50 C.F.R. § 17.22 (emphasis added).

**1. ESA Section 7 Consultation**

Pursuant to ESA Section 7, the issuance of an ITP by the Service is a discretionary federal action that triggers the obligation to consult with FWS's Ecological Services Office. The goal of Section 7 consultation is to ensure that the proposed action is not likely to jeopardize the continued existence of endangered (or threatened) species or adversely modify designated critical habitat. *See* 16 U.S.C. § 1536(a)(2). Under applicable FWS regulations, as part of the consultation, the Service must "[e]valuate the *effects of the action* and *cumulative effects* on the listed species or critical habitat." 50 C.F.R. § 402.14(g)(3) (emphases added).

"Effects of the action" is a defined term within the Services' regulations. The term "refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action." 50 C.F.R. § 402.02. To distinguish the effects "*of the action*" – here the effects of issuing the ITP – from the effects of other past and present activities within the action area, the effects of the action are "added to the environmental baseline." *Id.* (emphasis added). "The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process." *Id.* Importantly, for purposes of whether vehicle strikes of panthers should be addressed as "indirect effects" of the ITP (in addition to addressing vehicle strikes in the baseline and cumulative effects discussions), the regulations define "[i]ndirect effects" as "those [effects] that are *caused* by the proposed action and are later in time, but still are reasonably certain to occur." *Id*. (emphasis added).

The Section 7 consultation analysis also considers the effects of future activities, other than the action under consultation, as part of a "cumulative effects" analysis. "Cumulative effects" are defined by FWS regulations as "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." *Id*. In other words, the incremental effect of the proposed action is distinguished from and considered in light of not only baseline conditions, but also non-federal activities that are reasonably certain to occur in the future.

In sum, effects that are caused by *the action* – here, effects caused by issuing the ITP – are considered in the section 7 analysis as either direct or indirect effects. Effects that are caused by *other activities* within the action area – including effects caused by an applicant's underlying project, Revised Handbook at 4-14 – are considered as part of the baseline or cumulative effects analysis. Ultimately, the purpose of the section 7 consultation analysis is to determine whether the federal action itself – here, issuing the ITP – is itself likely to *cause* jeopardy or adverse modification based on the action's direct and indirect effects when considered in light of baseline conditions and projected future non-federal activities.

Following consultation, the Service will issue an opinion determining whether issuing an ITP will cause jeopardy or adverse modification. 16 U.S.C. § 1536(b)(3)(A). "Our Section 7 analysis determines if the impacts of take [resulting from the proposed action], when combined with other past, present, and future impacts, are likely to jeopardize the continued existence of the covered species in the wild ...." Revised Handbook at 12-6. If FWS concludes that the agency action would place the listed species in jeopardy, "the [agency] shall suggest those reasonable and prudent alternatives which [it] believes would not violate [Section 7] and can be taken by the Federal agency . . . in implementing the agency action." 16 U.S.C. § 1536(b)(3)(A); *see also* 50 C.F.R. § 402.14(h)(3).

**2. NEPA Analysis**

Issuing an ITP is also a federal action that is subject to environmental review under the National Environmental Policy Act (NEPA). 42 U.S.C. § 4321, *et seq.* Pursuant to NEPA, FWS has determined it will prepare an Environmental Impact Statement (EIS) to analyze the environmental impacts of the federal action; here, issuing the ITP. The EIS will discuss the environmental impacts of the proposed action, alternatives, and any adverse environmental effects.

In accordance with the Council on Environmental Quality's regulations, the discussion of environmental effects shall include direct, indirect, and cumulative effects. 40 C.F.R. § 1502.16; *see also* definition of "effects" at 40 C.F.R. § 1508.8. Direct effects, are those impacts that "are *caused* by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a) (emphasis added). Similar to the ESA definition, indirect effects "are *caused* by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b) (emphasis added). "Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7.

### B. Determining the Proper Scope of Environmental Analysis Requires Accurately Defining the Federal Action.

Applying the proper scope of environmental analysis is critical to developing an appropriately tailored and supportable EIS (under NEPA) and Biological Opinion (under ESA Section 7) and, ultimately, an appropriate and supportable ITP. The Revised Handbook emphasizes:

> [F]or HCP projects involving an . . . [EIS], it is important to be precise about the underlying Federal action. For some projects, there has been considerable confusion over what the actual "scope" of a Federal action was in response to an [ITP] application. Misunderstanding the scope often leads to an overstatement of impacts, . . . and encumbering applicants and the Services with unwarranted, costly, and time-consuming EIS's.

Revised Handbook at 4-14. To avoid misstating impacts attributable to the ITP or otherwise confusing the analyses, and to ensure proper and supportable environmental reviews, the Service must accurately define the federal action, then determine the effects proximately caused by that action (both direct and indirect), and consider the incremental impact of those effects in relation to baseline conditions and overall cumulative effects.

The action proposed by FWS here is the issuance of an ITP authorizing take incidental to covered activities, but not the covered activities themselves. The take that is likely to be caused by issuance of the ITP is harassment resulting from light, noise, or vibration associated with construction or mining activities that annoys panthers or other species to such an extent that it disrupts normal behavioral patterns. The ITP only authorizes and controls these limited forms of *take*. The ITP does not authorize or control the overall covered activities (e.g., construction activities generally), nor could it.

### C. Determining the Direct and Indirect Effects of the Action Requires Assessing Those Effects That Are Proximately Caused By the Action.

The Supreme Court has held that "proximate cause" is the governing standard for determining direct and indirect "effects" of the action under NEPA, and its holding applies equally by extension to reviews under the ESA. The law generally distinguishes between two types of causation: proximate (or legal) and cause-in-fact (or "but for"). Proximate cause is "[a] cause that is legally sufficient to result in liability[;] [a] cause that directly produces an event and without which the event would not have occurred." Black's Law Dictionary 213.[6] "But for" causation casts a much wider net, capturing a broader series of events that can be traced to a particular action without regard to whether the actor is in a position to control those events, and considers whether an injury would have occurred "but for" the action at issue.

[6] Black's Law Dictionary includes a frequently cited quote from *Prosser and Keeton on Torts*: "'Proximate cause' – in itself an unfortunate term – is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct. In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would 'set society on edge and fill the courts with endless litigation.' As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy. BLACK'S LAW DICTIONARY at 264 (5th ed. 1984) (citing W. Page Keeton *et al.*, *Prosser and Keeton on Torts* § 41) (internal citations omitted).

According to the Supreme Court, "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations. . . . NEPA requires a reasonably close causal relationship between the environmental effect and the alleged cause [analogous] to the familiar doctrine of proximate cause from tort law." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (citations omitted). In *Public Citizen*, the U.S. Department of Transportation (DOT) was not required to consider air emissions from Mexican trucks when issuing safety regulations that determine entry because, despite the fact that the regulations determined when the trucks could enter the U.S. (*i.e.*, the trucks could not enter the U.S. but for issuance of the regulations). The Supreme Court held that the regulations were not the proximate cause of the alleged air emissions, and DOT lacked the authority to regulate those emissions. In other words, "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Id.* at 770. Thus, the air emissions could not be deemed either a direct or indirect effect under NEPA. *Id.* at 763-69.[7]

The lower courts have likewise rejected "but for" causation as a basis for attributing effects to an agency action, including in the form of alleged "indirect" effects. For example, in the seminal NEPA case *Winnebago Tribe of Nebraska v. Ray*, plaintiffs challenged the NEPA review of a federal permit authorizing the construction of a transmission line across the Missouri River. 621 F.2d 269 (8th Cir. 1980). The river crossing comprised approximately 1.25 miles of the 67-mile transmission line. Plaintiffs alleged that the NEPA analysis should have considered the impacts of the entire line (including potential impacts on the bald eagle), not just the crossing. 621 F.2d at 272. The plaintiffs asserted that the remainder of the line would not be

[7] As noted above, the definition of "indirect effects" under the ESA also requires causation.

built "but for" the river crossing, and thus the effects of those portions of the line should have been considered as "indirect" effects of the permit. *Id*. at 272-73. The Eighth Circuit rejected the application of "but for" causation to determine indirect effects, stating that while the federal agency had discretion to consider environmental impacts, "that discretion must be exercised within the scope of the agency's authority [which] extend[ed] only to areas in and affecting navigable waters." *Id*. at 272.

These same principles have been applied in the ESA context, as well. In *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), environmental groups challenged the EPA's decision to transfer permitting power under the CWA[8] to state administrative authorities in Arizona. During Section 7 consultation on the proposed transfer of administrative authority, FWS raised concerns that the federal action "could result in the issuance of more discharge permits, which would lead to more development," without the ability to consult on each permit. 551 U.S. at 653. However, "EPA believed that the link between the transfer of permitting authority and the potential harm that could result from increased development was too attenuated," and thus not an effect attributable to its transfer action. *Id.* at 653-54. The Supreme Court, citing *Public Citizen*, acknowledged that EPA has no discretion over the NPDES permitting transfer authority, and thus is not the legal cause of effects of the NPDES transfer. *Id.* at 667-68 (2007) ("[T]he basic principle announced in *Public Citizen* – that an agency cannot be considered the legal 'cause' of an action that it has no statutory discretion *not* to take – supports the reasonableness of the FWS's interpretation of [Section 7] as reaching only discretionary agency actions.").[9]

[8] Specifically, the authority to issue permits under the National Pollutant Discharge Elimination System (NPDES).

[9] Likewise, both the majority and Justice O'Connor in her concurring opinion explained in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* that application of the Services' regulatory definition of "harm"

The Eleventh Circuit, in which the ITP and HCP will apply, has recognized that *Public Citizen* applies equally to ESA section 7 consultation. The court noted that the "statutory and regulatory framework for determining when an agency action requires section 7(a)(2) consultation is materially indistinguishable from the framework of [NEPA] considered by the Supreme Court in *Department of Transportation v. Public Citizen*." *Florida Key Deer v. Paulison*, 522 F.3d 1133, 1143 (11th Cir. 2008).

The Fifth Circuit recently emphasized the importance of proximate cause in a decision holding that that the licensure of water diversions could not be deemed an indirect cause of downstream take of whooping cranes. In *Aransas Project v. Shaw*, the court noted that the overbroad concept of indirect causation urged by the plaintiffs could be criticized for implying that "issuing drivers' licenses will 'cause the take' of endangered species run over by cars . . .." 775 F.3d 641, 659 (5th Cir. 2014). The court rejected the plaintiff's broad theory of indirect causation, and explained that "[a]pplying a proximate cause limit to the ESA must therefore mean that liability may be based neither on the 'butterfly effect' nor on remote actors in a vast and complex ecosystem." *Id*. at 657-58.

The Revised Handbook also adopts a causation standard that reflects proximate – not "but for" – causation. "[T]he specific activity that [an ITP] authorizes, the incidental take of endangered species, may be merely one component of a large project involving non-Federal activities that do not require Federal review or authorization. Determining whether our NEPA analysis should consider the impacts of that larger activity requires analysis of the extent of our

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at 50 C.F.R. § 17.3 "is limited by ordinary principles of proximate causation." 515 U.S. 687, 709 (1995) (O'Connor, J., concurring); *see also id.* at 700 n.13 (majority concluding that agency regulation is subject to "ordinary requirements of proximate causation and foreseeability"). Justice O'Connor explained, that, for example, the destruction of seedlings that would otherwise grow to provide food and shelter for endangered birds is not a proximate cause of a subsequent death or injury to those birds. *Id*. at 714. There, as here, "the regulation clearly rejects speculative or conjectural effects, and thus itself invokes principles of proximate causation." *Id*. at 712 (emphasis omitted).

'*control and responsibility*' over the applicant's overall project." Revised Handbook at 13-4 (citing 40 C.F.R. § 1508.18) (emphasis added). Critically, the Revised Handbook specifies that "*[s]imple 'but for' causation is not enough*" and that "[t]here must be a reasonably close *causal relationship* between issuance of the ITP and the effects under consideration to require analysis under NEPA." *Id*. (emphases added).

## III. Roadway Impacts Are Not Effects Proximately Caused by the ITP, But Are Appropriately Considered in the Baseline and Cumulative Effects Analyses.

### A. Vehicle Strikes May Be Appropriately Considered Within the Context of the Environmental Baseline.

The authorization of incidental take via the issuance of an ITP is the action subject to NEPA and ESA's Section 7 requirements. Under Section 7, the Service makes a jeopardy determination by evaluating the *effects* of the proposed action in the context of the species' current status (baseline conditions), taking into account any cumulative effects. 50 C.F.R. § 402.14(g)(3) (During formal consultation the Service is responsible for evaluating "the effects of the action and cumulative effects on the listed species"). The environmental baseline includes the past and present impacts of all activities (Federal, State, or private) in the action area, the anticipated impacts of proposed federal projects in the action area that have completed Section 7 consultation, and concurrent state or private actions. 50 C.F.R. § 402.02.

Here, the environmental baseline with respect to the Florida panther would include conditions relevant to its current status, including location and amount of habitat, recruitment, disease, and other factors. The baseline would also include historical and ongoing vehicle strikes in the area, since they contribute to the species' current status.

### B. Vehicle Strikes May Be Reasonably Considered Within the Cumulative Effects Analysis.

In the context of Section 7 consultation, cumulative impacts include the effects of future private or state actions within the action area "that are reasonably certain to occur." *See* 50 C.F.R. § 402.2. In other words, the incremental effect of the ITP is considered in light of non-federal actions that are reasonably certain to occur in the future. Similarly, in discussing the cumulative effects of the action under NEPA, it is appropriate for the Service to include vehicle strikes within the discussion of past, present, and future impacts. Accordingly, the Service's ESA and NEPA reviews should consider traffic impacts, including potential vehicle strikes, but should do so in the context of describing baseline conditions or considering cumulative effects.

### C. Vehicle Strikes are Not Direct or Indirect Effects of the Service's ITP

The direct effects of the ITP are the potential irritation of panthers through construction light, noise, or vibration. The indirect effects of panther annoyance – those effects caused by the ITP but which occur later in time and are still reasonably *certain* to occur – may include changes to the panther's hunting behavior or dispersal patterns. Den relocation or territorial disputes with other panthers are remote possibilities, but it is doubtful they meet the reasonably-certain-to-occur standard. Potential vehicle strikes of panthers on are not direct or indirect effects of the proposed ITP.

The proposed ITP is not the proximate cause of vehicle strikes because there is not a reasonably direct chain of causation between the ITP and a vehicle collision with a panther, and the factors that lead to vehicle strikes are beyond the control of FWS. "[W]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Public Citizen*, 541 U.S. at 770. The ITP is not even a "but for" cause of vehicle strikes, because vehicle

operations (and even the covered activities) would occur without the ITP, and it cannot reasonably be said that one or more vehicle strikes would not occur but for the ITP. In any event, the "but for" standard does not apply and has been rejected by the courts because it would make parties liable for effects they do not control. Only direct and indirect effects *proximately* caused by an agency action may be attributed to that action under NEPA and the ESA. As the Revised Handbook emphasizes:

> Properly defining the action subject to our control and responsibility requires a qualitative assessment of the applicant's project and the role of the Service with respect to that project. The Service's ability to exercise discretion over an ESA permit applicant's non-Federal activities is limited to ensuring the non-Federal entity's permit application meets the statutory and regulatory criteria in section 10(a)(2)(B) of the ESA and 50 CFR 17.22 (b)(l) and 17.32(b)(l).

Revised Handbook at 13-4.

The cases that address take causation demonstrate that control over the action that directly causes take is a prerequisite to finding that an action caused take. In *Strahan v. Coxe,* the First Circuit held that a Massachusetts agency that regulated and licensed the use of gillnets and lobster pots "in specifically the manner" that caused actual takes of endangered Northern Right whales was liable for take. 127 F.3d 155, 164-66 (1st Cir. 1997). In *Loggerhead Turtle v. Cnty. Council of Volusia Cnty., Fla.*, the Eleventh Circuit cited *Coxe* and adopted the First Circuit's recognition of the critical importance of control in assessing take causation: "[t]his case . . . involves a regulatory entity that exerts *control* over the use of something that allegedly takes protected wildlife .... Volusia County ordained beachfront lighting, allowing landowners to use lights all day and all night . . . or use lights only during daylight hours and turn them off at sunset . . .." 148 F.3d 1231, 1251 (11th Cir. 1998) (emphasis added). Similarly, in *Defenders of Wildlife v. Adm'r, Envtl. Prot. Agency*, the Eighth Circuit held that, because EPA controlled through its registration program whether farmers could continue to use a poison (strychnine) that

was killing endangered black-footed ferrets, EPA violated the take prohibition by deciding to register the poison. 882 F.2d 1294, 1300-01 (8th Cir. 1989); *see Loggerhead Turtle*, 148 F.3d at 1251 (noting that "*Defenders of Wildlife* involve[d] a regulatory entity that exerts control over the use of something that allegedly takes protected wildlife").

Lastly, in *United States v. Glenn-Colusa Irrigation Dist.*, the U.S. District Court for the Eastern District of California held that an irrigation district was liable for take of threatened salmon where the irrigation district controlled the pumping of water from a river, and the irrigation district pumped the water with such force that salmon were sucked into and battered against a fish screen. 788 F.Supp. 1126 (E.D. Cal. 1992). The irrigation district argued that the state, rather than the irrigation district, caused the take because the state placed the fish screen in the river, but the court rejected this argument, noting that the state installed the screen to protect salmon and the screen only "becomes hazardous because of the force exerted by the District's pumps." *Id*. at 1133.[10]

Here, by contrast, FWS controls none of the factors that contribute to vehicle strikes. FWS does not authorize automobile operation at all, much less "specifically [in] the manner" that causes take, and it is not the proximate cause of panther strikes – automobile operation is. *Strahan*, 127 F.3d at 163-66. Nor does FWS control the use of automobiles or provide the authority pursuant to which a driver "exacts a taking" of panthers. *Loggerhead Turtle*, 148 F.3d at 1251-53. FWS does not issue drivers' licenses or register the automobiles that strike panthers, *Defenders of Wildlife*, 882 F.2d at 1300-01, or physically force cars to collide with panthers. *Glenn-Colusa Irrigation Dist.*, 788 F.Supp at 1133.

[10] The court also rejected the irrigation district's argument that "the California definition of the proximate cause of a taking rather than federal common law [of proximate cause]" should apply, doubting that Congress intended different applications of the ESA "depending on state law definitions of proximate cause" and concluding that the California proximate cause standard would not help the irrigation district in any event. 788 F.Supp. at 1133-34.

Moreover, FWS does not design Florida's roads. Transportation planning, for the most part, is the province of the Collier County Metropolitan Planning Organization (MPO), in collaboration with the Florida Department of Transportation (FDOT). *See* 23 U.S.C. § 134. The MPO uses current zoning, land-use projections, and other computer models to forecast anticipated transit needs and develop a Long-Range Transportation Plan. Roadway expansion projects are prioritized for federal funding based on a variety of factors including environmental impact, economic development, mobility, safety, security, and quality of life. The actual construction of roads is often performed at the local, county, or state level. None of these government activities directly control whether a panther-vehicle collision occurs, but they illustrate how far removed FWS's proposed ITP (and ECPO's activities) are from any basis for attribution of or liability for roadway take. Accordingly, ECPO's HCP specifically notes that the covered activities:

> do[] not include the existing state and county roadway network, and avoidance and minimization of environmental impacts resulting from improvements to the transportation network are the responsibility of [FDOT] and [MPO], together with State and Federal environmental regulatory agencies.

Draft HCP at 84. Finally, FWS does not set speed limits.[11]

The cases described above demonstrate that the causation requirement applies equally to both direct and indirect effects, and thus roadway strikes of panthers may not be deemed indirect effects of the ITP for NEPA or ESA section 7 consultation purposes. As a further example, in *Ctr. for Biological Diversity v. U.S. Dep't of Hous. & Urban Dev.*, plaintiffs challenged federal

[11] The ESA Section 7 Consultation Handbook actually uses the regulation of speed limits as an example of an action of a third party *not involved* in the federal action, and thus, beyond FWS control. ESA Section 7 Consultation Handbook (Consultation Handbook), at 4-44 (Mar. 1998) ("Although a strong effort should always be made to identify reasonable and prudent alternatives, in some cases, no alternatives are available to avoid jeopardy or adverse modification. Examples include cases in which the corrective action relies on: . . . actions of a third party not involved in the proposed action (e.g., only [a third party], which is not a party to the consultation, has the authority to regulate speed limits).").

mortgage insurance, loan guarantees, and loans used for residential and commercial development in Sierra Vista, Arizona, on the basis of noncompliance with the NEPA and ESA section 7 consultation requirements. 541 F.Supp.2d 1091 (D. Ariz. 2008), *aff'd*, 359 F. App'x 781 (9th Cir. 2009). The plaintiffs alleged that the federal financing facilitated development that led to reduced flows in the San Pedro River, thereby harming two endangered species, and that these impacts to listed species constituted "indirect effects" for NEPA and ESA purposes. *Id*. at 1098. The court rejected the argument, noting that "to fall under the definition of indirect effects, the degradation of the San Pedro watershed must . . . be 'caused' by the proposed action." *Id*. at 1101. The court held that the "[p]laintiffs[']argument fails at the outset" because federal financial assistance programs do not "cause harm to the listed species . . .. [t]he financial assistance programs at issue here are too attenuated to affect the listed species." *Id*. Citing the Supreme Court's decision in *Public Citizen*, the court rejected the argument that impacts to endangered species residing in the San Pedro watershed were indirect effects of the federal actions.[12]

Since FWS does have control or responsibility for the primary factors that contribute to vehicle strikes, the agency's action is not the proximate cause of those strikes. Likewise, there is

[12] The Consultation Handbook points to *Nat'l Wildlife Fed'n v. Coleman* as an example of when development impacts may be considered indirect effects of an agency action. Consultation Handbook at 4-29 (citing 529 F.2d 359 (5th Cir. 1976)). There, the Federal Highway Administration financed and controlled 90% of an interstate highway project that ran through endangered sandhill crane habitat, including the placement of highway interchanges. The court held that the agency's decision to place a highway interchange in the crane's habitat would have the indirect effect of causing associated commercial and residential development to occur at that location, and thus such impacts must be considered as indirect effects of the agency's decision. The court's decision was based on the extent to which the agency controlled and determined the location of private development, based on its extensive control over the highway routing and placement of interchanges. 529 F.2d at 374. By contrast, where (as here) local land use plans anticipate or determine the location of private development, the impacts of such development are not deemed to be direct or indirect effects. *See, e.g., City of Carmel-By-The-Sea v. U.S. Dep't of Transp*., 123 F.3d 1142, 1163 (9th Cir. 1997).

no indication that vehicle strikes are reasonably certain to occur as a result of the agency action. Therefore, such effects should not be attributed to the ITP, either directly or indirectly.[13]

## IV. Conclusion

Attributing to the ITP effects that are not proximately caused by the ITP would render the NEPA and ESA analyses factually, scientifically, and legally unsound. It would leave the analyses without a limiting principle, and impose upon FWS and ECPO an arbitrary burden to address effects beyond their control. It would also require ECPO members to mitigate for the effects of third parties actions outside of their control. Such an approach is not only objectionable to ECPO, but would dissuade other groups from pursuing similar HCPs. FWS should address roadway impacts on listed species as baseline conditions or in cumulative effects analyses, but should not treat these effects as "direct" or "indirect" effects attributable to or controlled by the ITP.

[13] During discussions on this matter, reference was made to the consideration of traffic impacts in the City Gate ITP Environmental Assessment (EA) and Biological Opinion (BO). Those documents discuss traffic impacts, but do so in general connection with the overall underlying project; they do not state that traffic impacts are caused by the ITP. Indeed, even with respect to the overall project, the BO explains that FWS cannot attempt to attribute any specific level of traffic impacts because "[t]raffic and intraspecific aggression are risks to the panther that are cumulative in nature, and, as such, they are difficult to quantify or to tie to any specific project." BO at 63. Thus, the City Gate EA and BO do not provide a basis for treating roadway impacts as effects of the ITP.

# Re: Eastern Collier HCP -- white paper

1 message

**Albrecht, Virginia** <valbrecht@hunton.com> Tue, May 2, 2017 at 8:53 PM
To: Gary Frazer <gary_frazer@fws.gov>
Cc: Cynthia Dohner <Cynthia_Dohner@fws.gov>, Mike Oetker <mike_oetker@fws.gov>, Leopoldo Miranda <Leopoldo_Miranda@fws.gov>

Gary -- Thanks for getting this going. VSA

Sent from my iPhone

On May 2, 2017, at 8:05 PM, Gary Frazer <gary_frazer@fws.gov<mailto:gary_frazer@fws.gov>> wrote:

Virginia -- The Regional Director's office reached out to the Solicitor's office, and our SOL attorney is now engaged on this issue and expects to provide her review of your white paper by the middle of the month. -- GDF

Sent from my iPad

On Apr 27, 2017, at 12:12 PM, Albrecht, Virginia <valbrecht@hunton.com<mailto:valbrecht@hunton.com>> wrote:

Gary – Here's the white paper we sent to the Service in February. As discussed, we had very productive meetings in Collier County yesterday and Tuesday with Rob Tawes and David Dell (from the regional office) and Ken MacDonald and Connie Casseler (sp?) ( from Vero Beach) and have made good progress on completing the HCP and the draft EIS (and related environmental reviews). All agree that in order to move forward we need the Solictor's office to engage on the issue of how to address vehicle strikes of panthers, and we appreciate your help in securing that important involvement. I think there was general sentiment that the decision how to address vehicle strikes could have national implications, so coordination with headquarters would likely be useful at some point.

Let me know if you need anything further. I will be out of the office today and tomorrow so best way to call me is via cell phone – 240-498-6409.

Thanks, Virginia

<image001.jpg>

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<ECPO Legal Summary of Proper Scope of Environmental Analysis for Roadway....pdf>

Frazer, Gary <gary_frazer@fws.gov>

# UWAG v. NMFS (S.D. Alabama) (Critical Habitat Regulations) Meeting

1 message

**Wood, Jeffrey (ENRD)** <Jeffrey.Wood@usdoj.gov> Wed, Jun 14, 2017 at 4:32 PM
To: "Williams, Jean (ENRD)" <Jean.Williams@usdoj.gov>, "Barsky, Seth (ENRD)" <Seth.Barsky@usdoj.gov>, "Flax, Meredith (ENRD)" <Meredith.Flax@usdoj.gov>, "Floom, Kristen (ENRD)" <Kristen.Floom@usdoj.gov>, "Flanagan, Devon (ENRD)" <Devon.Flanagan@usdoj.gov>, "shawn.finley@sol.doi.gov" <shawn.finley@sol.doi.gov>, "gary_frazer@fws.gov" <gary_frazer@fws.gov>, "Joan.Goldfarb@sol.doi.gov" <Joan.Goldfarb@sol.doi.gov>, "Benjamin.Jesup@sol.doi.gov" <Benjamin.Jesup@sol.doi.gov>, "ann.navaro@sol.doi.gov" <ann.navaro@sol.doi.gov>, "Adam.Issenberg@noaa.gov" <Adam.Issenberg@noaa.gov>, "RuthAnn.Lowery@noaa.gov" <RuthAnn.Lowery@noaa.gov>, "Angela.Somma@noaa.gov" <Angela.Somma@noaa.gov>, "aturner@hunton.com" <aturner@hunton.com>, "kbbrown@hunton.com" <kbbrown@hunton.com>, "valbrecht@hunton.com" <valbrecht@hunton.com>, "kmcgrath@hunton.com" <kmcgrath@hunton.com>, "tward@nahb.com" <tward@nahb.com>, "jaugello@nahb.com" <jaugello@nahb.com>, "HaynieM@api.org" <HaynieM@api.org>

# UWAG v. NMFS (S.D. Alabama) (Critical Habitat Regulations) Meeting

Created by: gary_frazer@fws.gov

Time

1pm - 3pm (Eastern Time - New York)

Date

Wed Jun 21, 2017

Where

Department of Justice, 950 Pennsylvania Ave., NW, Room 2143

Description

My Notes

Guests

- ✔ Gary Frazer
- adam.issenberg@noaa.gov
- angela.somma@noaa.gov
- Ann Navaro
- aturner@hunton.com
- Benjamin Jesup
- Flanagan, Devon (ENRD)
- hayniem@api.org
- jaugello@nahb.com
- Williams, Jean (ENRD)
- Joan Goldfarb
- kbbrown@hunton.com
- kmcgrath@hunton.com
- Floom, Kristen (ENRD)
- Flax, Meredith (ENRD)
- ruthann.lowery@noaa.gov
- Barsky, Seth (ENRD)
- Rebecca Finley
- tward@nahb.com
- valbrecht@hunton.com

# Re: [EXTERNAL] Guidance on harassment

1 message

**Albrecht, Virginia** <valbrecht@hunton.com> Fri, May 4, 2018 at 4:48 PM
To: "Frazer, Gary" <gary_frazer@fws.gov>
Cc: Jay Herrington <jay_herrington@fws.gov>, David Dell <david_dell@fws.gov>, Jeff Newman <jeff_newman@fws.gov>, Trish Adams <Trish_Adams@fws.gov>, "Turner, Andrew" <aturner@hunton.com>

Gary — Thanks for the prompt response.

Actually it was David Dell who sent the guidance to us. I think he and Andrew Turner may have had some brief discussion on this, but we will coordinate with the field and the region as you suggest to make sure we have a solid understanding of the lay of the land. Then, if necessary, arrange a meeting with you and other hq folks.

Thanks, Virginia

Sent from my iPhone

On May 4, 2018, at 12:40 PM, Frazer, Gary <gary_frazer@fws.gov<mailto:gary_frazer@fws.gov>> wrote:

Virginia -- My assistant, Lois Wellman, works 6a-3p, so that's probably why you got vm. Main number is below, but you can always call my cell at (202) 253-4578.

The take guidance is not intended to set any new standard or limitation, but rather to clarify the longstanding FWS regulatory definitions of harass and harm. I'm interested to hear what take you anticipate that would not fall within the definition of harm.

Have you discussed this with your FWS contacts in the field and the Region, and do they share your view?

Copying Jay Harrington, who is acting ARD, and David Dell. If you haven't discussed this with them, I'd suggest that as the first step. If this needs to be elevated to HQ, I'm happy to discuss and will be in all next week. -- GDF

Gary Frazer
Assistant Director -- Ecological Services
U.S. Fish and Wildlife Service
(202) 208-4646

On Fri, May 4, 2018 at 3:17 PM, Albrecht, Virginia <valbrecht@hunton.com<mailto:valbrecht@hunton.com>> wrote:
Gary — I tried calling you but got a woman's voice so didn't leave a vm thinking I must have an old number.

The new guidance on harassment could have a profound impact on the HCP our ECPO group has been working on with the support of key NGOs in Collier County, Florida. We'd like to come in to discuss with you. Please call or email to set up a good time to meet. Cell number is 240-498-6409.

Thanks, and hope all is well, Virginia Albrecht

PS — what is your best phone number ?

Sent from my iPhone